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8 THERMOLIFE INTERNATIONAL LLC, an
9 Arizona limited liability company,

10 Plaintiff,

11 v.

12 https://ronkramermusclebeach.wordpress.com/,
13 an Internet domain name;
14 https://ronkramermusclebeach.wordpress.com/
15 author/musclebeachkramer/, an Internet
16 domain name,

17 Defendants.

18 Case No. [5:15-cv-01616-HRL](#)

19 **ORDER (1) DENYING AUTOMATTIC,
20 INC.'S MOTION TO INTERVENE AS
21 OF RIGHT; (2) GRANTING
22 AUTOMATTIC, INC.'S MOTION FOR
23 PERMISSIVE INTERVENTION; AND
24 (3) DENYING PAUL ALAN LEVY'S
REQUEST FOR APPOINTMENT AS
GUARDIAN AD LITEM**

25 Re: Dkt. Nos. 6, 7

26 Plaintiff ThermoLife International LLC (ThermoLife) filed this action in rem, asserting a
27 sole claim for relief under the Anticybersquatting Consumer Protection Act (ACPA), 15 U.S.C. §
1125(d). ThermoLife seeks the transfer or cancellation of the registration for
“ronkramermusclebeach.wordpress.com” and “ronkramermusclebeach.wordpress.com/
author/musclebeachkramer”. These are internet blogs hosted by WordPress.com, which is owned
and operated by Automattic, Inc. (Automattic).

28 ThermoLife is an Arizona company that sells dietary supplements. It says that it owns
federally registered “Muscle Beach” marks in connection with athletic clothing, business
consultation services, and health club services. Plaintiff says it also has pending trademark
applications for “Muscle Beach” in connection with dietary supplements and entertainment

1 services. Ron Kramer is ThermoLife's founder, President, and Chief Executive Officer.
2 According to the complaint, he is widely known in the dietary supplement industry and is
3 recognized as being affiliated with ThermoLife and the names by which it does business, such as
4 "Muscle Beach."

5 The subject blogs contain unflattering information and comments about ThermoLife and
6 Kramer. Plaintiff alleges that the blogs are registered and authored by someone being paid by
7 dietary supplement companies to promote dietary supplement products and to disparage the
8 Muscle Beach name and products with false and defamatory information.

9 ThermoLife says that before filing the present lawsuit, it tried to ascertain the identity of
10 the author, user, or licensee of the blogs by filing a civil action in Arizona state court against a
11 fictional John Doe defendant. In that action, ThermoLife served Automattic with a subpoena for
12 documents identifying the blogs' author, user, or licensee. Automattic responded that it had only a
13 single email address: becausescience@anonymousspeech.com. This is because an email address
14 is the only personal information WordPress.com requires its users to provide when establishing
15 accounts. (Dkt. 1, Complaint ¶ 26; Dkt. 7-1 at 9, Proposed Answer and Counterclaim in
16 Intervention, ¶ 26). ThermoLife says it was unable to identify the blogs' author, user, or licensee
17 from the email address provided by Automattic.

18 Plaintiff then served Automattic (via Automattic's counsel) with notice of its intent to file
19 the instant lawsuit, and a dispute erupted between the two companies as to the propriety of this
20 proceeding. There is no question that "ronkramermusclebeach" is a third level domain (also
21 known as a subdomain), appearing to the immediate left of the second level domain ".wordpress"
22 and two places to the left of the top level domain ".com".¹ Automattic, however, contends that
23 third level domains are not "domain names" covered by the ACPA and that the named defendants
24 do not violate that statute. Relatedly, Automattic takes issue with plaintiff's allegations that
25 Automattic is a "domain name registration authority" under the ACPA with respect to the named
26

27 ¹ It is undisputed that WordPress.com customers' domains generally are comprised of a unique,
28 user-chosen phrase, followed by ".wordpress.com." (For an additional fee, users may have a
domain that does not include ".wordpress.com".) (Complaint ¶ 24; Dkt. 7-1 at 9, Proposed
Answer and Counterclaim in Intervention, ¶ 24).

1 defendants.

2 Claiming that it has significant protectable interests in the subject matter of this suit,
3 Automattic moves to intervene as of right pursuant to Fed. R. Civ. P. 24(a). Alternatively, it seeks
4 permissive intervention under Fed. R. Civ. P. 24(b). If allowed to intervene as a defendant and
5 counterclaimant, Automattic intends to answer the complaint and to assert a sole counterclaim for
6 declaratory relief that the named defendants do not violate the ACPA. (Dkt. 7-1, Morton Decl.,
7 Ex. A (Proposed Answer and Counterclaim in Intervention)). ThermoLife opposes the motion.

8 At around the same time that Automattic filed its motion to intervene, Mr. Paul Alan Levy
9 of the Public Citizen Litigation Group in Washington, D.C. wrote a letter to the court offering to
10 serve as guardian ad litem of the named defendants. Mr. Levy, too, expresses concern that it is not
11 clear whether third level domains are “domain names” within the meaning of the ACPA and
12 whether they can form the basis for liability under that statute. ThermoLife opposes Mr. Levy’s
13 request.

14 The court sees no need for a hearing on Mr. Levy’s request, and Automattic’s motion to
15 intervene previously was deemed submitted on the papers without oral argument. Civ. L.R. 7-
16 1(b). Upon consideration of the moving and responding papers, the court denies Automattic’s
17 motion for intervention as of right, but grants Automattic’s alternate motion for permissive
18 intervention. Mr. Levy’s request for appointment guardian ad litem is denied.²

19 DISCUSSION

20 I. AUTOMATTIC’S MOTION TO INTERVENE

21 A. Intervention as of Right

22 Intervention as of right is governed by Fed. R. Civ. P. 24(a), which provides:

23 On timely motion, the court must permit anyone to intervene who:

25 _____
26 ² Also pending before the court is plaintiff’s motion for leave to use alternate service of process.
27 ThermoLife and Automattic currently are the only ones before the court, and both have expressly
28 consented that all proceedings in this matter may be heard and finally adjudicated by the
undersigned. 28 U.S.C. § 636(c); Fed. R. Civ. P. 73. Unserved defendants are not deemed to be
“parties” to an action within the rules requiring consent to magistrate judge jurisdiction. Neals v.
Norwood, 59 F.3d 530, 532 (5th Cir. 1995); see also Merino v. Saxon Mortgage, Inc., No. C10-
05584, 2011 WL 794988 at *1, n. 1 (N.D.Cal., Mar. 1, 2011) (Laporte, J.).

(1) is given an unconditional right to intervene by a federal statute; or (2) claims an interest relating to the property or transaction that is the subject of the action, and is so situated that disposing of the action may as a practical matter impair or impede the movant's ability to protect its interest, unless existing parties adequately represent that interest.

Fed. R. Civ. P. 24(a). Automattic does not identify any federal statute conferring an unconditional right to intervene. Thus, in order to intervene as of right, Automattic must meet four requirements: (1) Automattic must timely move to intervene; (2) Automattic must have a significantly protectable interest relating to the property or transaction that is the subject of the action; (3) Automattic must be situated such that the disposition of the action may impair or impede its ability to protect that interest; and (4) Automattic’s interest must not be adequately represented by existing parties. Arakaki v. Cayetano, 324 F.3d 1078, 1083 (9th Cir. 2003). Automattic bears the burden of showing that all of these requirements are satisfied. United States v. Alisal Water Corp., 370 F.3d 915, 919 (9th Cir. 2004). “Failure to satisfy any one of the requirements is fatal to the application, and a court need not reach the remaining elements if one of the elements is not satisfied.” Drakes Bay Oyster Co. v. Salazar, No. 12-cv-06134 YGR, 2013 WL 451813 at *3 (N.D. Cal., Feb. 4, 2013) (citing Perry v. Proposition 8 Official Proponents, 587 F.3d 947, 950 (9th Cir. 2009)).

“Rule 24 traditionally receives liberal construction in favor of applicants for intervention.” Arakaki, 324 F.3d at 1083 (citing Donnelly v. Glickman, 159 F.3d 405, 409 (9th Cir.1998)). “Courts are guided primarily by practical and equitable considerations.” Id. In deciding a motion to intervene, “[c]ourts are to take all well-pleaded, nonconclusory allegations in the motion to intervene, the proposed complaint or answer in intervention, and declarations supporting the motion as true absent sham, frivolity or other objections.” Southwest Ctr. for Biological Diversity v. Berg, 268 F.3d 810, 819 (9th Cir. 2001).

Automatic's motion is timely, and ThermoLife does not argue otherwise.³ This court is unpersuaded, however, that Automatic has a significant protectable interest related to the subject matter of the litigation. Thus, the court does not reach the remaining requirements for intervention

³ Automatic filed its motion only a few weeks after the complaint was filed and months before the scheduled Initial Case Management Conference.

1 as of right.

2 “The requirement of a significantly protectable interest is generally satisfied when ‘the
3 interest is protectable under some law, and that there is a relationship between the legally
4 protected interest and the claims at issue.’” Arakaki, 324 F.3d at 1084 (quoting Sierra Club v.
5 EPA, 995 F.2d 1478, 1484 (9th Cir.1993)). “The applicant must satisfy each element.” Id. “An
6 applicant generally satisfies the ‘relationship’ requirement only if the resolution of the plaintiff’s
7 claims actually will affect the applicant.” Id. (quotations and citation omitted). “The ‘interest’ test
8 is not a clear-cut or bright-line rule, because no specific legal or equitable interest need be
9 established.” In re Estate of Ferdinand E. Marcos Human Rights Litig., 536 F.3d 980, 985 (9th
10 Cir. 2008) (quoting S. Cal. Edison Co. v. Lynch, 307 F.3d 794, 803 (9th Cir. 2002)). “Instead, the
11 ‘interest’ test directs courts to make a practical, threshold inquiry, and is primarily a practical
12 guide to disposing of lawsuits by involving as many apparently concerned persons as is
13 compatible with efficiency and due process.” Id. (quoting S. Cal. Edison Co., 307 F.3d at 803).

14 Automattic says that as the owner and registrant of the domain name “wordpress.com,” it
15 has a significantly protectable interest in the property that is the subject of this lawsuit. Arguing
16 that “wordpress.com” is the only registered domain name at issue, Automattic submits a copy of
17 an ICANN⁴ WHOIS report showing that registration information could only be found for
18 “www.wordpress.com” and not for “www.ronkramermusclebeach.wordpress.com.” (Dkt. 7-1,
19 Morton Decl., Ex. B). Automattic further argues that ownership of a domain name is a recognized
20 and valid property right.

21 Be that as it may, it is not with “wordpress.com” that ThermoLife takes issue. ThermoLife
22 argues, persuasively, that “ronkramermusclebeach.wordpress.com” is the only property at issue.
23 Plaintiff points out that, as a practical matter, entering “wordpress.com” into a web browser takes
24 one to a completely different site than “ronkramermusclebeach.wordpress.com.” Moreover,

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26 ⁴ The Internet Corporation for Assigned Names and Numbers, “a non-profit oversight body that
27 coordinates the DNS [domain name system] on behalf of the United States Department of
Commerce.” Coalition for ICANN Transparency, Inc. v. VeriSign, Inc., 611 F.3d 495, 499 (9th
28 Cir. 2009).

1 Automattic has not convincingly demonstrated that resolution of ThermoLife's claim would affect
2 Automattic's property interest in "wordpress.com," which appears in the addresses of any number
3 of Automattic's customers.

4 Automattic nevertheless claims a significant protectable interest in its customers' First
5 Amendment rights, including the user/author of the subject blogs. It argues that its business good
6 will and its relationship with all of its customers will be damaged if the request to intervene is
7 denied. This, too, fails to convince. There is a First Amendment flavor to this case; and, even
8 ThermoLife acknowledges that there are First Amendment implications here (albeit, plaintiff says
9 they are tangential). Ultimately, however, this is not a First Amendment case. This is an ACPA
10 lawsuit, and the sole claim for relief concerns whether plaintiff is entitled to have the registration
11 for defendants transferred, or alternatively, canceled. 15 U.S.C. § 1125(d)(2)(D)(i) (limiting
12 remedies in an in rem action "to a court order for the forfeiture or cancellation of the domain name
13 or the transfer of the domain name to the owner of the mark.").

14 Automattic is not aided by its reliance on Select Retrieval, LLC v. ABT Elecs., No.
15 11C03752, 2013 WL 6576861 (N.D. Ill., Dec. 13, 2013) or Int'l Bus. Machines Corp. v. Conner
16 Peripherals, Inc., No. C-93-20117 RPA (EAI), 1994 WL 706208 (N.D. Cal., Dec. 13, 1994). In
17 both cases, non-parties were permitted to intervene as of right in actions accusing their customers
18 of patent infringement. But, unlike Automattic, both intervenors were found to have a significant
19 protectable interest in the litigation because they each had agreements to indemnify their
20 customers. Thus, in Select Retrieval, the intervenor was found to have a direct financial stake in
21 the litigation, as well as a binding legal obligation to its customers with respect to the subject
22 patent. 2013 WL 6576861 at *2. And, the court in Conner Peripherals concluded that the
23 plaintiff's claims against the customer essentially were claims against the intervenor. 1994 WL
24 706208 at *5. Automattic points to nothing of the kind here.

25 Finally, Automattic argues that it is entitled to intervene as of right to challenge plaintiff's
26 allegations that Automattic is a "domain name authority" under the ACPA with respect to the
27 named defendants. Automattic argues that if it is not allowed to intervene, then it will lose the
28 ability to challenge any injunction that might be imposed and suggests that its legal relationships

1 with users and with governing bodies of the internet, such as ICANN, would somehow change.
2 To be sure, Automattic contends that it is not a “domain name authority” under the ACPA. (Dkt.
3 7-1 at 12, Morton Decl., Ex. A, Proposed Counterclaim in Intervention, ¶ 8). But that contention
4 appears to be ancillary to its purpose in seeking intervention, i.e., to obtain a judicial declaration
5 that the named defendants do not violate the ACPA. (*Id.*).

6 In sum, Automattic has not shown that it has a significantly protectable interest related to
7 the subject matter of the litigation, and its motion for intervention as of right is denied.

8 **B. Permissive Intervention**

9 Nevertheless, for the reasons stated below, the court finds that Automattic satisfies the
10 requirements for permissive intervention and, in the exercise of its discretion, grants Automattic’s
11 alternate motion for the same.

12 “On timely motion, the court may permit anyone to intervene who . . . has a claim or
13 defense that shares with the main action a common question of law or fact.” Fed. R. Civ. P.
14 24(b)(1)(B).⁵ ThermoLife argues that permissive intervention should be denied because
15 Automattic does not have a protectable interest. Unlike intervention as of right, however, the
16 requirement of a legally protectable interest does not apply to permissive intervention. Employee
17 Staffing Services, Inc. v. Aubry, 20 F.3d 1038, 1042 (9th Cir. 1994) (citing S.E.C. v. United States
18 Realty & Improvement Co., 310 U.S. 434, 459, 60 S. Ct. 1044, 1054, 84 L.Ed. 1293 (1940)). All
19 that permissive intervention requires is ““(1) an independent ground for jurisdiction; (2) a timely
20 motion; and (3) a common question of law and fact between the movant’s claim or defense and the
21 main action.”” Freedom from Religion Foundation, Inc. v. Geithner, 644 F.3d 836, 843 (9th Cir.
22 2011) (quoting Beckman Indus., Inc. v. Int’l Ins. Co., 966 F.2d 470, 473 (9th Cir.1992)). Even
23 when the criteria for permissive intervention are satisfied, the court has broad discretion to grant or
24 deny intervention. Drakes Bay Oyster Co., 2013 WL 451813 at *8 (citing In re Benny, 791 F.2d
25 712, 721-22 (9th Cir. 1986)). “In exercising its discretion the court must consider whether the

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27 _____
28 ⁵ Permissive intervention may also be granted where an applicant is given a conditional right to
intervene by a federal statute. Fed. R. Civ. P. 24(b)(1)(A). Automattic has identified no such
statute.

1 intervention will unduly delay or prejudice the adjudication of the original parties' rights." Fed.
2 R. Civ. P. 24(b)(3).

3 As discussed, Automattic's motion is timely.

4 The jurisdictional requirement is also satisfied. Although Automattic intends to assert a
5 counterclaim for declaratory relief, that proposed counterclaim is based on the ACPA, the very
6 same federal statute at issue in plaintiff's complaint. ThermoLife contends that there is no basis
7 for Automattic's would-be declaratory relief claim, arguing that Automattic merely seeks an
8 advisory opinion that all third-level domains are not covered by the ACPA. Plaintiff contends that
9 Automattic's proposed counterclaim therefore will expand this litigation to matters beyond which
10 there is an actual case or controversy. The specific declaration sought by Automattic, however, is
11 that the named defendants do not violate the ACPA. (Dkt. 7-1 at 12, Morton Decl., Ex. A,
12 Proposed Counterclaim in Intervention ¶ 10). That is a matter that plaintiff squarely placed at
13 issue in its complaint, alleging that jurisdiction is proper here because the named defendants are
14 not immune from the ACPA's reach and because Automattic acted as a "domain name authority."
15 (Dkt. 1, Complaint ¶¶ 8-10). For these same reasons, the court finds that Automattic's proposed
16 counterclaim and defenses concern a common question of law and fact with the main action.

17 ThermoLife contends that permitting intervention will needlessly expand this litigation. It
18 may be that resolving this matter will not be as straightforward as it otherwise might be. But, any
19 additional time required to adjudicate this matter will not be undue. Nor does the court find that
20 the rights of other parties will be prejudiced. Automattic has raised what appears to be a
21 fundamental issue whether ThermoLife has an actionable claim under the ACPA with respect to
22 the named defendants. Whether Automattic is right or wrong on that point remains to be seen.
23 The court, however, would be aided in resolving such matters through a full and fair adversarial
24 process, rather than through ex parte proceedings. And, the court anticipates that Automattic's
25 presence in this lawsuit will contribute to the just and equitable resolution of the issues.

26 Automattic's motion for permissive intervention therefore is granted.
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II. MR. LEVY'S REQUEST FOR APPOINTMENT AS GUARDIAN AD LITEM

As discussed, Mr. Levy has volunteered to serve as guardian ad litem for the named defendants. Mr. Levy having pointed to no clear authority for the appointment of a guardian ad litem for the res in an in rem action, this court declines his offer. Nevertheless, the court will give him leave to request permission to file an amicus brief on specific issues in this litigation, as they arise and as may be appropriate. Any such request must identify the specific topics that Mr. Levy seeks to address and should be brought to the court's attention as promptly as possible.

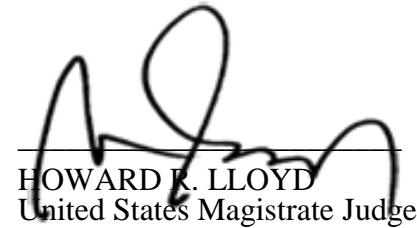
ORDER

Based on the foregoing, Automattic's motion for intervention as of right is denied, but its alternate motion for permissive intervention as a defendant and counterclaimant is granted. Automattic shall forthwith e-file its proposed Answer and Counterclaim in Intervention.

Mr. Levy's request for appointment as guardian ad litem for defendants is denied. He may, however, seek leave to file an amicus brief as issues arise and as may be appropriate.

SO ORDERED.

Dated: June 18, 2015



HOWARD R. LLOYD
United States Magistrate Judge

1 5:15-cv-01616-HRL Notice has been electronically mailed to:

2 Eric Blair Hull ebh@kflawaz.com, bjb@kflawaz.com, kld@kflawaz.com

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7 5:15-cv-01616-HRL Courtesy copy of this document sent by U.S. Mail to:

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United States District Court
Northern District of California